In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 511

EDWARD J. SIMONS, ET AL., PETITIONERS

v.

JERRY VINSON and A. P. CLARK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND, IN THE ALTERNATIVE, MOTION FOR LEAVE TO INTERVENE IN OKLAHOMA v. TEXAS

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 394 F.2d 732 (App. 1-9).

JURISDICTION

The judgment of the court of appeals was entered on May 3, 1968. Except for a clerical correction, the court denied a petition for rehearing on June 17,

1968 (App. 10-11). The jurisdiction of this Court is based upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a suit brought by private parties against various departments and officials of the federal government to adjudicate title to property with the United States was correctly dismissed on the ground that the United States had not consented to such suit.

2. Whether this Court should re-open the case of *Oklahoma* v. *Texas*, 252 U.S. 372, to allow private parties to intervene, on the basis of an allegation that the United States is not honoring the decree in that case.

STATEMENT

In September 1966 petitioners brought suit against the Department of the Interior, the Bureau of Land Management, and the Bureau of Indian Affairs to enjoin them from issuing oil and gas leases on certain property and to compel execution of quitclaim deeds to that property.[1] Petitioners, who are riparian

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[1] By proposed amendment—which the district court said would not affect the disposition of the case—they attempted to name as defendants Stewart L. Udall, Secretary of the Interior; Boyd L. Rasmussen, Director of the Bureau of Land Management; and Robert L. Bennett, Commissioner of Indian Affairs. The federal departments and officials are herein referred to as federal respondents. The original complaint also named as defendants lessees of the land in question and a purchaser of oil from them.

landowners on the south bank of the Red River in Wichita County, Texas, claimed they had acquired title to some 1,000 acres by accretions occurring between 1935 and 1950. Portions of this property were in possession of lessees of the United States under oil and gas leases issued between 1925 and 1956 in accordance with the Act of March 3, 1909, 35 Stat. 783, as amended, 25 U.S.C. 396; and the Act of March 4, 1923, 42 Stat. 1448, 30 U.S.C. 230-236, replaced by Sections 1 and 2 of the Act of June 22, 1948, 62 Stat. 576, 43 U.S.C. 209-210.[2]

The district court dismissed petitioners' action against the federal respondents on the ground that it was an unconsented suit against the United States. The court of appeals affirmed, one judge dissenting.[3]

ARGUMENT

1. The decision of the court of appeals is in accord with the decisions of this Court. *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682; *Malone* v. *Bowdoin*, 369 U.S. 643; *Dugan* v. *Rank*, 372 U.S. 609; *Hawaii* v. *Gordon*, 373 U.S. 57. In *Larson* and

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[2] Part of the land is held in trust by the United States for the heirs of Ray Doyah, an Indian allottee. Such trust land was under an oil and gas lease approved by the Bureau of Indian Affairs.

[3] Following in part the suggestion of the court (App. 8, fn. 10), petitioners have instituted a suit against the United States and the federal officials for monetary relief. The suit was dismissed on jurisdictional grounds by the district court, and an appeal was taken and is now pending in the Fifth Circuit (No. 25945).

Malone, suits were brought against federal officials for relief with regard to property claimed by the plaintiffs. This Court held that where the relief sought would reach property of the United States it was immaterial that the United States was not named as a defendant. The Court, therefore, ruled that the complaints should be dismissed because the United States had not consented to such suits. Likewise, here the petitioners clearly seek to contest title with the United States, not with the Secretary of the Interior, Director of the Bureau of Land Management, or the Commissioner of Indian Affairs in their individual capacities. These federal officials neither claim title in themselves nor occupy the land in their individual capacities.

To avoid dismissal, petitioners assert that their allegations, which they claim must be accepted as true, show that the individual officials are acting illegally and thus they are not immune from suit (Pet. 11). However, a similar argument was rejected in *Larson* v. *Domestic & Foreign Corp.*, *supra* (at 692-693):

> We believe the theory to be erroneous. It confuses the doctrine of sovereign immunity with the requirement that a plaintiff state a cause of action. It is a prerequisite to the maintenance of any action for specific relief that the plaintiff claim an invasion of his legal rights, either past or threatened. * * * But, in a suit against an agency of the sovereign, it is not sufficient that he make such a claim. Since the sovereign may not be sued, it must also appear that the action to be restrained or directed is not action of the

> sovereign. The mere allegation that the officer, acting officially, wrongfully holds property to which the plaintiff has title does not meet that requirement. True, it establishes a wrong to the plaintiff. But it does not establish that the officer, in committing that wrong, is not exercising the powers delegated to him by the sovereign. If he is exercising such powers, the action is the sovereign's and a suit to enjoin it may not be brought unless the sovereign has consented.

See also, *Malone* v. *Bowdoin*, *supra*.

2. Nor is there merit to the suggestion that the Court reopen the case of *Oklahoma* v. *Texas*, 252 U.S. 372, to allow petitioners to intervene in that action to seek enforcement of the decree. Assuming that the Court might properly reopen such a case within its original jurisdiction at the instance of private persons, not parties to the suit, there is no reason to take such action here. The Court has consistently recognized that its original jurisdiction is not mandatory. See *Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 439, 464-465, and cases cited therein. This case presents no special facts warranting the exercise of the Court's discretionary jurisdiction. *Oklahoma* v. *Texas* involved a significant question concerning the boundary between those two states, which was also of major concern to the United States. While petitioners allege that the boundary in question has significantly shifted by accretion since the Court's decree, neither the two states involved nor the United States has sought any further decree from the Court. And the present controversy does not involve a dispute as to the meaning of this Court's

decree—both parties recognize that Texas riparian landowners are entitled to the benefits of accretion. The only question in conflict is whether an accretion has taken place.

Finally, it should be noted that denial of leave to intervene will not deny petitioners a hearing on their claim. As noted above, see note 3 *supra*, petitioners presently have an appeal pending in the Fifth Circuit on the question whether their claim comes within the Federal Tort Claims Act. Even if they are unsuccessful on that appeal, they may still bring an action in the Court of Claims. See *Malone* v. *Bowdoin*, 369 U.S. 643, 647 n. 8.

CONCLUSION

The petition for a writ of certiorari and the motion for leave to intervene in *Oklahoma* v. *Texas*, 252 U.S. 372, should be denied.

Respectfully submitted.

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